

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

DYCORA TRANSITIONAL HEALTH –
FRESNO, LLC,

Employer

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 2015,

Union.

Case: 32-CA-215700

DYCORA TRANSITIONAL HEALTH –
FRESNO, LLC,

Employer

and

ROSALINDA LORONA,

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 2015,

and

HEALTHCARE SERVICES GROUP, INC.,

Involved Party.

Case: 32-RD-213130

POST-HEARING BRIEF OF THE EMPLOYER

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I. INTRODUCTION

On January 17, 2018, a brave employee filed a petition to remove the Service Employees International Union, Local 2015 (“Union”) as the bargaining representative for a unit of employees employed by Dycora Transitional Health – Fresno, LLC (“Employer” or “Dycora Fresno”) or Healthcare Services, Group, Inc. (“HSG”).¹ The Union filed blocking charges which delayed the election until May 31.² Still, on that day, 74 employees voted against continued representation by the Union and 42 in favor. The Union unsuccessfully challenged the votes of 15 employees, including petitioner’s. Now, the Union tries another tack.

Each of the Union’s 7 objections to the election are meritless. So are the minor 8(a)(5) and (1) unfair labor practice allegations incorporated into one of them and subject to these combined proceedings. At core, the Union fails to meet *its “heavy burden”* to prove “*specific,*” objectionable conduct prejudicing the election; the record evidence from the hearing held August 28 to 30 does not justify setting aside the election. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (internal cite omitted); *see also Delta Brands, Inc.*, 344 NLRB 252 (2005); *see also Sequel of New Mexico*, 361 NLRB 1124, 1125 (2014). The Union’s proffered evidence of a few isolated incidents (which the Employer fully disputes) involving, at most, a handful of employees does not come close to overcoming a 32-vote margin loss (28% of votes cast). Holding otherwise would be truly novel and unjust. There is no evidence, nor has the Union alleged any, that the Employer has any history of discrimination or hostility toward the Union or its supporters.

The Board recognizes that a decertification petition entails “effort, organization, and sometimes even risk” by employees. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717,

¹ All dates are in 2018 unless otherwise indicated.

² On April 27, the Regional Director of Region 32 dismissed the Union’s Blocking Charges in Case numbers 32-CA-215709 and 32-CA-215714.

727 (2001). Employees may be expelled from the union for even filing an RD petition. *See Tawas Tube Products*, 151 NLRB 46 (1965). Thus, “[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). The Union’s objections and the Complaint should be rejected. The election results should be certified.

II. BACKGROUND

A. PARTIES

Dycora Fresno is a skilled nursing and rehabilitation center located in Fresno, California. GC Exh 1(c), p. 2. It provides housing and healthcare services to approximately 210 residents. 287:8-12. The Union (pending these decertification proceedings) is the exclusive bargaining representative of a unit (“Unit”) of 183 employees of Dycora Fresno:

All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, medical records assistants, and receptionists employed by the Employer, and all employees employed by Healthcare Services Group, Inc., (including housekeepers, janitors, and laundry aides) employed at the Employer’s facility in Fresno, California.

GC Exh. 1(v), p. 2; GC Exh. 1(v), p. 2.

The Employer and Union were parties to a collective bargaining agreement (“CBA”) which, via extension, expired on December 31, 2017. JT. Exhs. 1 and 2. The CBA includes a Management Rights provision at Article 3, which provides the Employer the “sole and exclusive right” to, *inter alia*, “direct and schedule the workforce.” Jt. Exh. 1., p. 3. The CBA also provides, at Article 4, “visitation rights” at the Employer’s facility to Union Representatives so long as they “confine discussions with employees to their respective rest and meal periods in designated non-work areas.” *Id.* at p. 4.

The Union's representatives assigned to the Dycora Fresno facility included, at all relevant times, Representative and Organizer Pauline Grant-Clarke. 122:19-20. Her responsibilities included visiting the facility and seeking to "enforce the contract, making sure that everything that is negotiated in the contract is as is." 123:3-25. She was "usually" in the Employer's breakroom at the facility. 88:6-8. In May, the Union also assigned External Organizer Ignacio Cortes to Dycora Fresno *because of* the decertification petition. 225:1-20. Cortes has more than a decade experience in union organizing and has received training to "make sure that we maintain the support. Promote employee to be motivated and union supporters." 249:15-250:6.

Cortes testified that he was present at the Employer's facility "every other day" in May, every day the week of the election, generally for 4.5 to 5 hours, spoke to 12-15 people daily, and that it was his responsibility to "help workers maintain support and unit throughout [the decertification election process]" and to "keep people motivated and make sure that they understand how important it is to keep the support so they can have collective power." 225:17-226:6; 228:15-20; 253:17-19; 253:20-22. Cortes testified that he met with employees in various locations including the basement of the facility outside of the breakroom, in the breakroom, and in the parking lot. 255:18-256:3. He posted union flyers on the designated Union bulletin board in the breakroom and distributed leaflets to employees. 256:24-257:9. On the last day before the election (May 31), Cortes distributed pro-union buttons to employees. 233:20-33; 270:25.

The Employer's facility has two floors, and its overall layout is "H" shaped. 316:6-13. There are two care floors and two hallways that run parallel to each other with a connecting hallways, and nurses stations are located at each corner. *Id.* There is a large dining room on the second floor, in the middle of the facility. *Id.* And there is a first floor dining room, near a large courtyard. 303:1-4. The kitchen and breakroom are located in the basement. *Id.* There are two

elevators in the middle of the facility; one service elevator runs from the kitchen to the dining room and the other is in the hallway across from the kitchen near a restroom. *Id.*; 337:1-6. The employee parking lot is in the basement of the building. 316:16-20.

B. PROCEDURE

On January 17, Rosalinda Lorona (the “Petitioner”), a certified nursing assistant (“CNA”) employed by the Employer, filed a petition to decertify the Union as the representative of the Unit (“Petition”). GC Exh. 1(o). On February 28, the Union filed unfair labor practice charges (“Charges”) which blocked processing of the Petition.

On May 15, the Regional Director of Region 32 (“RD”) issued a Decision and Direction of Election, amended May 18, setting an election date of May 31. GC Exh. 1(i). The Union challenged the ballots of 15 employees, including that of the Petitioner. GC Exh. 1(o). All of those challenges were rejected on June 12. GC Exh. 1(q). Then, on June 15, the RD ordered all the ballots opened and counted (except for one vote challenged by the Board because the person was not on the voter list). *Id.*

The RD’s final tally of ballots showed that of approximately 183 eligible voters, 74 votes were cast against continued representation by the Union and 42 in favor. GC Exh. 1(v). In other words, the Union lost **by 32 votes (i.e., 28% of the votes cast).**

On July 3, citing section 102.69(a) of the NLRB’s Rules and Regulations, the Union filed eleven objections to the election.³ GC Exh. 1(g). The RD ordered a consolidated hearing on seven

³ Section 102.69(a) of the NLRB’s Rules and Regulations states, in relevant part, that “[w]ithin 7 days after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in §102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are

of them, consolidating that proceeding with an unfair labor practice complaint (“Complaint”) that had issued in case number 32-CA-215700.⁴

In the Complaint, the RD alleged two discrete violations of section 8(a)(5) and (1) by the Employer, in December 2017 (*i.e.*, five months before the election): not bargaining with the Union prior to making 15-minute changes to shift schedules for Dietary Department (colloquially, the “Kitchen”) employees, and not bargaining with the Union before ending a practice of “allowing” them to eat extra food prepared by, but not consumed by, Respondent’s residents. GC Exh. 1(c). On June 8, the Employer filed its Answer and Affirmative Defenses. GC Exh. 1(n). There is no dispute that the alleged shift schedule change was rescinded on January 9 (the day it was to be implemented) and alleged food policy change by February.

III. ARGUMENT

“Representation elections are not lightly set aside.” *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325,328 (5th Cir. 1991) (internal citation omitted). “There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Id.* Thus, the burden of proof on the Union, who seeks to set aside the Board-supervised election, is a “heavy one.” *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (internal cite omitted).

sufficient in number to affect the results of the election.” Thus, the Employer objects to any effort that the Union may undertake to assert or argue objections that were not timely filed under Section 102.69(a); *cf. Phone-Poulenc, Inc.*, 271 NLRB 1008 (1984) (holding that the Board’s election rule time limits require parties to “[a]ct promptly in unearthing and reporting” objectionable conduct, and that the Board will only consider evidence of misconduct unrelated to the timely filed objection “when the objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but was also previously unavailable.”).

⁴ The RD also ordered a consolidated hearing on the objections filed by the Union in the decertification election involving Dycora Transitional Health – Clovis LLC. GC Exh. 1(v). There, the Union lost a decertification election held on May 30, where 21 employees voted against continued representation and 12 in favor. *Id.* However, on the day before hearing, the Union disclaimed interest and that case was remanded to the RD for further processing or dismissal. 8:19-9:24.

The Union “must show, inter alia, that the conduct in question affected employees in the voting unit, *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where there was no evidence that unit employees knew of alleged coercive incident), *see Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999), and had a reasonable tendency to affect the outcome of the election.” *Delta Brands, Inc.*, 344 NLRB 252 (2005).

When election results are “close,” objections must be “carefully scrutinized.” *First Student, Inc.*, 359 NLRB 1090, 1093 (2013) (union lost election by 4% of votes cast); *see also Quest Intern.*, 338 NLRB No. 123 (2003) (dismissing objections and noting that the election “was not close” where it was decided by “relatively wide 13-33 margin.”). Here, the election was not close. The Union lost by 32 votes (74-42), or 28% of the total votes cast. Thus, minor or isolated incidents cannot be presumed to have impacted the overall result absent strong, detailed and specific evidence otherwise, which the Union has not provided.

A. UNFAIR LABOR PRACTICE COMPLAINT

The Complaint alleges two relatively minor, discrete violations of sections 8(a)(5) and (1) of the Act. First, that the Employer moved shift schedules up by 15-minutes for Dietary Department employees as of January 9, as announced in an in-service meeting in late December 2017 or early January. Second, that in late December 2017 or early January 2018, the Employer stopped allowing Dietary Department employees to eat extra food prepared for, but not consumed by, residents. There is no dispute that both of the alleged changes were rescinded following complaints, discussions, or notice with the Union months prior to the decertification election on May 31.

Neither of the alleged changes violate section 8(a)(5) or (1) of the Act. They were announced and implemented before the CBA expired on December 31, 2017. The parties' CBA contains a Management Rights provision that provides, *inter alia*, the Employer the “sole and

exclusive” right to “direct, control, and schedule its operations and workforce.” Jt. Exh. 1, p. 3-4. Indeed, the posted schedule for the Dietary Department has *always stated* that “Hours may be subject to change.” GC Ex 2. “When changes in existing plant rules ... constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice, they may in many instances be deemed not to constitute a ‘material, substantial, and significant’ change.” *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 716 (1992) (revision to sick leave policy did not trigger duty to bargain because it was subsumed within management’s right to police and administer existing employment terms).

Further, regarding the alleged schedule change, it was not implemented but instead retracted the day (January 9) it was intended to go into effect – there is *no evidence that a single employee* actually showed up to work early and worked the new schedule that day *because of* the announced schedule change. Instead, the record shows that some employees routinely showed up to work 15 minutes early or else did not show up to work under the new schedule because they overslept or did not want to do so. *See McClatchy Newspapers, Inc.*, 339 NLRB 1214, 1216 (2003) (no requirement to bargain over reduction in assignment of overtime because it was *de minimis* and there was no proof of impact on employees).

Additionally, counsel for the General Counsel’s (“GC”) own witness described the 15-minute schedule change as a “slight maneuver in time” that “didn’t really affect me at all.” For that reason alone, the allegation also fails as *de minimis* or at least as a failure to prove a material, substantial, and significant change under section 8(a)(5). *See Crittenton Hosp.*, 342 NLRB 686 (2004) (change in dress code not violation of Act where it was not significant departure from existing terms and conditions affecting employees).

Further, regarding the alleged change to food consumption policy, the undisputed record evidence is that Dietary Department Managers have articulated differing expectations regarding food consumption by Dietary Department employees over the years. Also, the GC's own Dietary Aide, Victor Gonzales, witness testified that there was a problem with employees consuming resident food, interfering with work duties, and causing late service. The alleged change in expectations, rescinded within one or two months, was made for undisputedly legitimate reasons and was within the Employer's continuing practice of, when necessary, announcing reasonable rules in the Dietary Department. *See Peerless Publications*, 283 NLRB 334, 335 (1987) (change in policy important to employer's core purpose, narrowly tailored to achieve that purpose, is not a violation of the Act).

1. Background

a. Dining Department Overview. Between 22 and 23 employees worked in the Dietary Department at all relevant times. 287:13-17. Their positions include Cook, Prep Cook, and Dietary Aide. 287:20. The purpose of the department is to provide the daily nutritional needs of residents via three meals per day and snacks based on individual dietary needs, as designated by doctor orders and nutritionist assessments. 288:1-15.

b. 15-Minute Schedule Adjustment. On December 28, Dietary Department Manager Raymond Gonzalez held an in-service regarding plans to begin each shift 15 minutes earlier. 289:6-20; GC Exh. 3. There had been problems meeting scheduled meal times for residents, resulting in late service. 289:22-24; 38:12-17. Residents have set eating schedules and their food was not being delivered within expectations. 290:2-4. Union steward and Cook Rodney Downes was present at the December 28 in-service. 34:16-19; GC Exh. 3.

At the December 28 in-service, Gonzalez told employees that all shifts would begin 15 minutes earlier but also end 15 minutes earlier (so, shifted by 15 minutes) 290:2-8. Gonzalez

explained the new starting time and distributed the new planned schedule to employees. GC Exhs. 3, 4; 36:1-18. The new schedule was to be effective January 9. 290:17.

Immediately after the December 28 in-service, Gonzalez posted the new schedule (GC Exh 4), which stated that it was “Effective Tuesday 9 January 2018” (sic), next to the then-current and former schedule (GC Exh 2) in the kitchen by the elevator, on a giant bulletin board with information for employees.⁵ 338:17-339:4; 31:11-21. The former (still effective schedule) which has long been posted at the facility stated its face that “Hours may be subject to change.” GC Exh. 2; 89:18-90:6. Dietary Aide Gonzales testified that it was his understanding that language meant that the Employer had the right to change scheduled hours for Dietary Department employees. 90:11-91:1.

According to her testimony at Hearing, on January 5 Grant-Clarke was told about the planned changes to schedule by Downes. 126:1-8. Two days later, Downes also sent Grant-Clarke a text message with a picture of the new schedule, as posted in the Dietary Department. 127:7-12. GC. Exh. 6.

On January 8, the Union sent a “cease and desist” letter to the Employer regarding the planned changes to schedules. Jt. Exh. 3. Then, that same day, the new schedule was removed from the posting board in the Dietary Department, and on January 9, Gonzales (upon his arrival to work at 7:30 AM) informed incoming and present staff members, on shift-by-shift basis, that day that the new schedule would not be effective and instead the Department would operate under the former one. 291:13-292:11; 323:24-324:3; 339:20-21. Downes also informed employees arriving for the

⁵ Dietary Aide Gonzales testified that he recalled the prior schedule was removed when the new one was announced (after leading questions from counsel from General Counsel), but around that point in his testimony he seemed to be temporarily unsure of details – he testified shortly before that “my head is swimming right now. I am so sorry, I feel like so stressed.” 42:16-43:10. Thus, Gonzalez’ testimony that the former (and still current) schedule has remained posted at all relevant times should be credited.

morning shift, including Dietary Aide Victor Gonzales that the new schedule was “cancelled.” 39:18-24. Dietary Aide Gonzales understood that the Union had said the change needed to be stopped and would not continue until further notice. *Id.*

Gonzalez also called those Dietary Department employees not scheduled to work on January 9 to inform them that schedule announced at the December 28 in-service was not effective. 325:2-11.

Some employees already, consistent with their usual practice, arrived to work 15-minutes early (at which point they were permitted to clock-in for work) on January 9. 291:5-12; Jt. Exh. 4; 323:4-6; 91:2-4. Dietary Aide Gonzales testified at Hearing that “[i]t [the schedule change] didn’t really affect me at all whether we were changing 15 minutes. **I just came in like I normally did every day.** I didn’t really pay – I didn’t care that it was I didn’t even notice it. It was such a slight **maneuver in time.**” 41:9-17 (emphasis added). Grant-Clarke also testified that some employees continued work on January 9 under the former schedule even when the new schedule was set to be implemented because “some people didn’t notice.”⁶ 157:12-158:4.

Eight employees out of fifteen worked at times consistent with the 15-minute-shifted schedule on January 9 but there is no evidence of whether they did so *because of* the new schedule or *because of* personal preference and practice. 291:2. The former and still current schedule (GC Exhibit 2) remains posted on the bulletin board in the kitchen. 340:3-5. It still states that “Hours may be subject to change.” GC Exh. 2.

c. Food Consumption. On December 28, Gonzalez held an in-service with Dietary Department employees where he informed them that they could not consume food prepared

⁶ Grant-Clarke testified that she did not withdraw the grievance she filed because she was waiting for the Employer to discipline employees who did not wake up early enough to attend work on the new schedule or otherwise failed to do so – but no employees were ever disciplined. 157:21-158:6.

for residents or leftovers. 295:1-19; GC Exh. 5. Gonzalez explained that the Department was experiencing substantial time loss and waste because employees were consuming food intended for residents. 293:23-25; GC Exh. 5.

Gonzalez had observed employees cooking food for themselves, opening food prematurely, and causing food shortages on a daily basis. 294:1-10. For example, Gonzalez observed employees opening packages of tortillas to make themselves burritos and tacos, opening bags of diced chickens and sautéing them, and overall causing food shortages during resident meal service. 294:12-18.

Dietary Aide Gonzales testified that he (and other employees) had, in fact, made complaints about coworkers eating food. 93:1-23. He recalled, for example, that there was no bacon for residents who had requested it, and that co-workers' eating food had interfered with food preparation. 94:8-17-94:21-95:7; 96:14-19. It is undisputed that there has never been a written rule regarding consumption of extra or resident food. 295:20-25. Dietary Aide Gonzales testified that it was merely "word of mouth," "unwritten rule," and "based on the cook's feelings." 96:14-19. He clarified that it was a "personal practice" and that it was something "the manager wanted." 113:1-3. No employee has been disciplined for consumption of food. 340:14-25; 92:7-13. Previous Department Managers, however, have expressed varying expectations regarding consumption of food. 297:1-18.

During the December 28 in-service, to clarify his expectations, Gonzalez specified that employees could continue to "taste" foods in connection with their duties, and that a "taste" should constitute 1 tablespoon. Immediately after the December 28 in-service, Gonzalez' new expectations went into effect. 53:18-25.

For approximately a week after the December 28 in-service, the Dietary Department discarded about 10 servings. 298:19-299:5. After that, however, the Department achieved close to

zero waste. *Id.* Cooks prepared exactly the amount necessary for residents, based on standardized recipes detailing the amount of ingredients to the ounce. 299:7-9.

On February 15, Grant-Clarke emailed the Employer's Administrator Ken Evans "regarding reinstate the lunch or dinner for dietary members" in apparent reference to Gonzalez's clarification of expectations regarding food consumption. Jt. Exh. 5. The next day, Evans responded that staff had been consuming food intended for meal service and caused shortages for residents. *Id.* After further consideration, the Employer decided to permit Dietary Department employees to consume food left over from the main meal service, after residents have eaten. *Id.*

One and a half or two months after the December 28 in-service, Dietary Department Manager Gonzalez informed employees that they were permitted to eat food that remained after meal service. 298:16-18. Dietary Aide Gonzales stated that he understood the "policy" was in effect for "a couple of days" or "two days." 54:11-22.

There is no dispute that employees are permitted to consume food as they had before Gonzalez's December 28 in-service. 54:1-10; 97:10-13. Dietary Aide Gonzales testified that it was his understanding that the "the Union gave us back the food, the ability [to eat food again]" because Grant-Clarke had raised the issue. 54:6-10.

2. The GC And Union Fail To, And Cannot, Meet Their Burden To Prove A Sufficient Change To Policy Was Implemented.

The GC and Union fail to meet their burden to prove a "material, substantial, and significant" unilateral change in violation of section 8(a)(5) of the Act. *Murphy Oil USA*, 286 NLRB 1039, 1041 (1987). Regarding the alleged schedule change, the General Counsel's primary witness, Gonzales, testified that "[the schedule change] didn't really affect me at all whether we were changing 15 minutes. I just came in like I normally did every day. I didn't really pay – I didn't care that it was I didn't even notice it. It was such a slight maneuver in time." 41:9-17. Where an

employer's action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(1) and (5) of the Act. *See House of the Good Samaritan*, 268 NLRB 236, 237 (1983).

Regarding the change to food consumption, Gonzalez credibly testified that prior Dietary Managers had also articulated their varying expectations for the consumption or non-consumption of food. For example, Gonzalez testified that the first Dietary Department Manager (Oralia Mares) who hired Gonzalez allowed absolutely no eating or drinking of any good product. 297:1-5. The next one, (Funzell Thompson), permitted employees to eat up to five percent of prepared food. 297-7-9. The following, (Daniel Mullins), never addressed consumption of food. 297:16-18. Gonzalez's clarification of his expectations, upon becoming Dietary Department Manager, was in line with the reasonable discretion exercised by his predecessors.

3. The Alleged Changes Were Announced And Implemented Under The Contract's Management Rights Provision And Per Continuing Past Practice.

The Parties' CBA, which was in effect until December 31, 2017, includes an extensive and detailed Management Rights provision at Article 3, which privileged the alleged unilateral changes and announcements of same, regarding shift schedules and food consumption. *Jt. Exh. 1, p. 3-4.* Article 3 "clearly and unmistakably" confers rights on the employer to "schedule" and promulgate and enforce rules and regulations governing conduct. *See Quebecor World Mt. Morris II*, 353 NLRB 1, 3 (2008) (dismissing 8(a)(5) allegation based on unilateral implementation of performance improvement process where CBA provided the employer, *inter alia*, "exclusive right" to "establish and apply reasonable standards of performance"); *see also Provena Hospitals*, 350 NLRB No. 64 (2007) (dismissing 8(a)(5) allegation based on unilateral implementation of disciplinary policy based on attendance where CBA provided the employer, *inter alia*, the right "to make and enforce rules of conduct"); *see also United Technologies Corp.*, 300 NLRB 902, 903

(1990) (clear and unmistakable waiver of union's right to bargain regarding overtime hours based on express management right to “shift schedules and hours of work”).

The CBA’s Management Rights provision, which reflects a detailed and extensive waiver of rights by the Union, states in relevant part:

The Employer retains the exclusive right to manage the business, to direct, control, and schedule its operations and workforce, and to make and all decisions affecting the business, whether or not specifically mentioned herein, and whether or not heretofore exercised except as specifically limited by the express terms of this Agreement. Such prerogatives shall include, but are not limited to, the sole and exclusive rights to:

.... select and determine the number of its employees, including the number assigned to any particular work or work unit; to increase or decrease that number; direct and schedule the workforce ... ; determine the work duties of employees; promulgate post and enforce rules and regulations governing the conduct and acts of employees during work hours; ... ; determine job qualifications, work shifts, work pace, work performance levels, standards of performance, and methods ... and in all respect carryout, in addition, the ordinary and customary functions of management, all without hindrance or interference by the Union except as specifically abridged, altered or modified by the express terms of this agreement.

Id. (emphasis added added).

In *Baptist Hospital of East Tennessee*, 351 NLRB No. 12 (2007), the Board rejected an alleged violation of 8(a)(5) and (1) where an employer unilaterally implemented a change in its scheduling of holiday shift work for employees. The Board reasoned that the parties’ contract clearly and unmistakably specified that management had the right to make schedule changes. The contract stated that the employer had the right to “to determine and change starting times, quitting times and shifts,” and the rights to “assign” employees and to “change methods and means by which its operations are to be carried on.”

Here, as in *Baptist Hospital, Quebecor*, and *Provena*, the Employer bargained for and achieved the “exclusive right” to “schedule its operations and workforce,” to “direct and schedule the workforce,” and to otherwise “promulgate post and enforce rules and regulations governing the conduct and acts of employees during work hours.” Jt. Exh. 1. Thus, the Employer’s unilateral announcement on December 28, 2017 of both the alleged changes to schedule and food eating policy were privileged.

Even if, *arguendo*, the GC or Union alleges an interpretation of the Management Rights provision which does not privilege the Employer’s right to change schedules or food policy, that still fails to prove a violation of section 8(a)(5). “[W]hen an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.” *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (internal cite and quotation marks omitted). In *NCR*, the Board overturned the trial judge and held that the unilateral transfer of work did not violate 8(a)(5) and (1) where those actions were undertaken within a reasonable interpretation of the parties’ contract.

Further, the Employer’s alleged changes were announced, or implemented consistent with, past practices. See *House of the Good Samaritan*, 268 NLRB 236, 237 (1983). Here, the schedule in the Dietary Department has always expressly stated that hours are subject to change. Thus, any change was per that notice, effective rules, and ongoing understanding of the Employer’s rights. “When changes in existing plant rules, however, constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice, they may in many instances be deemed not to constitute a ‘material, substantial, and significant’ change.” See *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991). Most recently, in *Raytheon Network Centric Systems*, 365

NLRB No. 161 (2017), the Board held that an employer's unilateral modification of employee medical benefits after expiration of their contract with the Union did not violate section 8(a)(5) of the Act. The Board explained that the employer's actions were a "continuation of its past practice of making similar changes" in the preceding years. Thus, there was not any "change" constituting a violation of sections 8(a)(5) or (1).

B. OBJECTIONS TO ELECTION

The Union fails to meet *its heavy burden* of proving that the misconduct alleged in its objections interfered, under an objective standard, with employee freedom of choice, *especially* where the vast majority of employees rejected continued representation of the Union, 74 votes to 42, and where the Union deployed two agents to the facility to vigorously drum up support and respond to any campaigning by the Employer (as discussed above). *See Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). Further, Oviedo credibly testified that she provided training to the Employer's managers and supervisors regarding the election and explained to them that they were prohibited from engaged in any threatening, interrogating, promising, or soliciting conduct. 361:16-362:17. She also explained to them that it was important they remember to be respectful and professional throughout the election process. *Id.*

To determine whether employee freedom of choice has been sufficiently impacted to justify the drastic remedy of setting aside an election, the Board considers the larger context and environment prior to the campaign, including the following factors:

- (1) the number of incidents;
- (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit;
- (3) the number of employees in the bargaining unit subjected to the misconduct;
- (4) the proximity of the misconduct to the election;
- (5) the degree to which the misconduct persists in the minds of the bargaining unit employees;

- (6) the extent of dissemination of the misconduct among the bargaining unit employees;
- (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct;
- (8) the closeness of the final vote; and
- (9) the degree to which the misconduct can be attributed to the party.”

Franklin Preparatory Academy, 366 NLRB No. 67 (2018) (ordering re-run of election decided by one vote).⁷

Even where objectionable conduct occurs, if it is isolated and there is no evidence that it impacted the election results, the Board will not set aside an election. *See, e.g., Metz Metallurgical Corp.*, 270 NLRB No. 128 (1984) (supervisor’s inquiry about employee’s feelings toward the union and remark that employees would lose fringe benefits if union won the election insufficient to effect election results where employees voted 77-53 against the union); *see also Bon Appetit Management Co.*, 344 NLRB No.130 (2001) (holding that supervisor’s inquiry about employee’s plan to vote for or against union and threat, in violation of 8(a)(1), did not justify setting aside election where conduct involved one employee, two weeks before the election, at the employee’s regular work station, and supervisor was relatively low in management hierarchy.).

1. Failure of Objection 4 (Promised or implied benefits to eligible voters if the Union lost the election)

“An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (quoting Section 8(c) of the Act).

⁷ *See also Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157 (2001) (ordering re-run of election decided by one vote).

The Union's proffered evidence for Objection 4 is limited, consisting of **(i)** testimony from CNA Maria Hernandez that **(a)** she was offered, and accepted, *one piece of candy* from Assistant Administrator Phylcia Smith with a sticker attached stating "vote no for the Union"; **(b)** that Dycora Fresno co-cofounder and CEO Julianne Williams, in response to questions from employees in an all-staff meeting the week of the election, stated that it was not true (as rumor had it) that if the Union lost the election employees' accrued vacation and sick hours would be lost; **(c)** Assistant Administrator Phylcia Smith told Hernandez, the next day, that some employees would receive retro pay after Hernandez asked a question about same during the all staff meeting; **(ii)** that the Employer distributed a letter the week before the election stating that it was not true that employee would be "denied back pay for raises given in 2017" and that the Employer had agreed to payment as requested by the Union during discussions to resolve the grievances.

The Union may attempt to rely on **(iii)** testimony at the Hearing from CNA Rosalinda Lorona regarding statements made by Williams in an all-staff meeting responding to employee questions about wages at non-union facilities, **(iv)** testimony from Williams that a few movie tickets and \$5 Starbucks gift cards were provided in an all-staff meeting (like usual in a staff meeting) the week prior to the election; **(v)** testimony from Dietary Aide Victor Gonzales that a Nutritionist told him that if there was no Union at the facility, there could be more fun activities; **(vi)** testimony from Dietary Aide Victor Gonzalez that the Employer held an "anti-union barbeque" prior to the election; and **(vii)** testimony from Union organizer Cortes that on May 25 or 26, Dietary Department Manager Raymond Gonzalez told three Dietary Employees in the breakroom employees that he could get them more money if they voted against the Union.

Regarding (i)(a), Hernandez testified that the Employer had in the past offered employees candy or donuts from time to time. 207:10-18. Further, she testified that after she took the candy

offered, Smith did not ask any questions or engage in further discussion; Hernandez simply walked away. *Id.* There is no indication that Smith or a reasonable person would have been coerced by the receipt of a single piece of candy with basic, permissible messaging of the Employer's position in the election (voting no).⁸ The Board holds that "coffee and doughnuts are too minimal a 'benefit' to interfere with, restrain, or coerce the employees in the selection of their representative." *Joe's Plastics*, 287 NLRB 210 (1987). The Union's suggestion that a single piece of candy would influence any employee's freedom of choice is quite fanciful.

Regarding (i)(b), CNA Maria Hernandez testified that she attended an all-staff, non-mandatory meeting the week of the election where Williams spoke to more than ten employees. 193:20-194:8. Hernandez testified that in that meeting, Williams primarily responded to questions from employees. 196:13-200:15. She recalled that one CNA asked whether it was true, as rumor had it, that if the Union lost the election that all employees' sick hours would be lost, and that Williams responded 'no.' *Id.* Hernandez also recalls that another employee asked whether it was true, as rumor had it, that if the Union lost the election that employee's vacation hours would be lost, and again Williams responded 'no,' and that they would remain the same. *Id.*

Williams' alleged statements, made in response to employee questions about rumors the Union was apparently spreading, do not constitute an impermissible promise of benefits. 211:12-15. First, such forfeiture of vacation hours would be contrary to California state law which considers vacation hours as "wages" not subject to forfeiture. *See* Labor Code 227.33. Second, Williams' responses amounted to neither a promise nor threat based on the election outcome—rather, she simply stated that there was no plan to change vacation or sick hours based on whether

⁸ Dietary Aide Gonzalez also testified that candy was distributed prior to the election but he testified that there was no messaging on it. 75:10-75:20.

the Union won or lost. Maintenance of the status quo is, and cannot, reasonably be interpreted as either a threat or a promise. The only implicit threat here was the Union's apparent spreading of a rumor that employee sick and vacation hours would be eliminated if the Union lost the election.

Regarding (i)(c) and (ii), the Employer provided nothing but truthful information to Hernandez, in response to her question referencing whether some employees would be receiving payments pursuant to settlement of grievances *filed by the Union* regarding retroactive payment of wage increases. Dycora Fresno's HR Consultant, Keri Oviedo, credibly testified that by April, the Employer and Union had agreed that the Employer would make payments to employees per the Union's December 2017 grievances regarding retroactive pay increases.⁹ 349:14-24;359:2-17; Union Exhs. 3(b), 3(c). Indeed, the Employer noted that in the letter distributed to employees the week prior to the Election. Union Exh. 6 ("you will not be denied your back pay for raises given in 2017 [per the Union's grievances]. Although we do not agree with the Union's interpretation, we have agreed to pay the additional increases.").¹⁰

The Parties had discussed resolution of the grievances during, *inter alia*, caucus sessions during contract negotiations. 357:22-358:9. A formal settlement agreement was executed by the Union and Employer on July 6 after the parties' legal counsel prepared an agreement. Er. Exh. 5;

⁹ That the Union requested arbitration on May 22 regarding the grievances is not notable given that the final, written settlement agreement was not fully executed until July 6. Employer Exh. 5. A demand for arbitration in May is not inconsistent with Oviedo's testimony that the Employer and Union had already reached agreement in principle to make the payments demanded by the Union as of April, and Vasquez's testimony that the Union had posted in the breakroom a flyer stating "Your money will be paid". Employer Exh. 5. Union negotiator Jim Philiou's testimony was not inconsistent with Keri's; Jim coyly testified that there "was a settlement discussion in April" but he would not elaborate on it. 178:7-11.

¹⁰ By the language in the Employer's letter, the Union could have (and likely did) attempt to take credit for achieving payment of the retro pay which they had been seeking via their grievances. Thus, the Employer's statement by itself, while true, could not have adversely impacted employee free choice or perception of the Union. See Union Exh. 6; see also Employer Exh. 1.

357:9-21; 366:19-367:2. Dietary Aide Dolores Vasquez credibly testified that the Union itself began promising payments to employees in May, posting a flyer in the employee breakroom stating “Your money will be paid 7/20/2018” on top of an Memorandum of Understanding between the Employer and Union addressing, *inter alia*, “wage increases.” 372:24-373:374:17; Employer Exh. 1.

In that final Settlement Agreement, the Parties explained that “a dispute arose between the Company and the Union regarding the payment of wage increases pursuant to the [CBA], and on around December 21, 2017, the Union filed four grievances against the Company over the dispute.” *Id.* The Employer initially denied those grievances but eventually agreed with the Union to the payments in order to “fully and finally” settle the matters. *Id.* Under that agreement, the Company was required to, and did, make payments to certain employees (in certain amounts) as specified by the Union. *Id.*; 358:17-22. Again, the Union itself began promising payments to employees in May, posting a flyer in the employee breakroom stating “Your money will be paid 7/20/2018” on top of an Memorandum of Understanding between the Employer and Union addressing, *inter alia*, “wage increases.”¹¹ ER. Exh. 5; 372:24-373:374:17.

Regarding (iii), Lorona initially testified that at no time prior to the election was she aware of any instance where the Employer promised any benefits or made any promises based on how employees vote in the election. 392:16-21. She also testified that prior to the election Williams

¹¹ Grant-Clarke’s testimony, on the final day of hearing after listening to all witnesses testify, that she wrote “Your Money will be paid” on the posting at issue on July 10 is not credible. In her testimony, she implied that was the point that the grievances were first settled, when in fact, Oviedo credibly testified that the Union and Employer had reached agreement to resolve them in April. 488:18-22 ; 349:14-24;359:2-17. Grant-Clarke displayed a hostile and evasive demeanor during her testimony which taints her credibility; her motive and interest to prevent the decertification of the Union is particularly acute where she was the assigned Union representative for the facility and likely perceived the decertification vote as a personal attack upon her by some employees.

spoke in an all-staff meeting (one or two weeks prior to the election), where she responded to questions from employees about rumors that had been spreading. 392:22-395:8. Lorona, after being asked numerous times to recount Williams' exact statements, appeared to have difficulty recalling the details of Williams' statements, and instead offered summarized and at times inconsistent testimony. *See Fjc Sec. Servs., Inc.*, 360 NLRB 32, 35 (2013) (not crediting testimony because, while seemingly an attempt to tell the truth to the best of ability, it was compromised by general lack of memory about events)

Lorona testified that Williams said employees would not "automatically get raises," that the company would first look at "service" and "evaluations." 395:3-397:4. When asked if Williams specifically promised raises, Lorona testified "no." 397:7-14; 402:2-3. Lorona further clarified that Williams states that "I can't promise you, but, you know, look at with any business. You know, if you do a good job, your yearly evaluation, you know, if you deserve that raise you get it or however." 397:7-20. Lorona also testified that Williams said that the company would first "have to look into it" 407:23-25.

On the whole, Lorona indicated she had difficulty remembering "word for word" what was said by Williams, because "it was so long ago." 406:5-8. However, she confidently testified that Williams made efforts to explain to the employees that they should be comfortable voting either for or against the union, and that they should not feel threatened either way. 398:10-399:4. Lorona also recalled that the Union made promises to employees prior to the election that employees were "going to get raises." 402:5-9.

Lorona's passing reference that Williams discussed wage increases was not definite or clear and she indicated she was having difficulty recalling specifics from the meeting. Her most confident testimony focused on the fact that Williams *did not* make promises and wanted

employees to be comfortable voting either for or against the Union. That testimony is consistent is that of Dietary Aide Dolores Vasquez, who testified that there were no threats or promises made by management relating to the election or voting for or against the Union. 371:13-372:9. That testimony is also consistent with that of CNA Maria Hernandez who testified that she was at the meeting where Williams spoke, and that Williams stated she could not make any promises after employees asked her questions. 213:11-13; 216:4-8. Lorona's partial testimony that Williams did not make any specific promises is consistent with (and clarified by) the credible testimony of Williams herself. No other employee testified that Williams or any other member of management made any promises of any kind, implied or explicit at any time. Indeed, the GC's and Union's own witness Dietary Aide Gonzalez testified that when Williams spoke to him and others "she didn't offer us anything, she didn't promise anything. We asked for offers; we asked for promises. We're like, can you guarantee that we're going to do this. She said we just – she said I just wanted to let you know I'm going to do my best for you guys and ... that was basically it." 66:20-67:5.

Williams testified (in much greater detail than Lorona) that she spoke to employees on May 29 in an all-staff (but non-mandatory) meeting in the second-floor dining. 429:22430:1. Williams explained that she had been informed that employees wanted to ask her questions. 430:6-12. Williams began by introducing herself and that she understood they (the employees) had questions for her because they had "heard a lot of things" from the Union, including that employees would lose their jobs if they did not vote for the Union. 433:1-11. Williams also explained that, as a ground rule, that she could not discuss certain issues and that she was going to follow the rules, that she "cannot make promises." 435:6-13. *See Suburban Journals of Greater St. Louis*, 343 NLRB 157, 159 (2004) (holding that specific statement by employer that it could not make promises supported overruling objection based on alleged promises).

Williams is a highly trained and accomplished executive, aware of the rules regarding what can and cannot be said during union elections. It belies commonsense to believe that she would make any promise of wage increases to employees two days before an election. 428:3-429:18.¹²

Williams credibly testified that in response to an employee's question "will we get a raise," Williams responded that "I can't tell you anything about wages or anything like that. I cannot promise you anything. I can tell you that you can ask some of our non-union facility staff members, and you guys all know them, or you can know how to find them, what it is, you know, we pay them and what their benefits, but I can't promise you a raise." 444:18-445:25. She stated that employees at other facilities did receive annual increases but that she "could not promise that same thing would happen with them." 462:18-23. Williams specifically testified (and was "very certain") that, at no point, did she say that the Employer would consider or look into providing a raise. 445:1-447:7.

An employer may lawfully inform employees of the higher wages and benefits its nonunion employees at other facilities receive, and can lawfully respond to requests for information from

¹² The Union may attempt to twist Williams' testimony that she met with a few Dietary Department employees on May 30 to mean that she engaged in a prohibited speech within 24 hours of the election (held May 31). First, the Union never filed a timely objection regarding such and so should be precluded from doing so now. Second, even if considered, such an objection would have no merit. Williams testified without contradiction that she met with "a couple" of Dietary Employees on the day after she spoke in the all-staff meeting on May 29 because they had not been able to attend and wanted to speak with her. 479:15-480:4. The Board prohibits *mandatory* speeches to *massed assemblies* of employees on company time and property within 24-hours of an election. *Peerless Plywood Co.*, 107 NLRB 427 (1954); *see also Excelsior Laundry Co.*, 186 NLRB 914 (1970). The Board does not prohibit more casual conversations between a few employees and a party within 24 hours of the election. *See Business Aviation, Inc.*, 202 NLRB 1025 (1973). The basis for the *Peerless Plywood* rule is to prevent the impact of mass psychology on a group which may override other arguments made during the campaign. *Id.* Here, Williams' meeting with a few Dietary Department employees was undisputedly *upon their request*, limited in scope, and not the type of mandatory mass assembly for which the *Peerless Rule* is designed. Gonzales' testimony indicated that the meeting was not mandatory because he chose to leave before it concluded. 67:11-13.

employees about such benefits. *See Suburban Journals of Greater St. Louis*, 343 NLRB 157, 159 (2004); *see also TCI Cablevision of Washington*, 329 NLRB 700 (1999) (“An employer has the right to compare benefits presently in effect in its unorganized facilities with those enjoyed by employees in a similar facility which has union representation.”). It is lawful for an employer to even state its opinion that employees would be better off without a union. *Langdale Forest Products Co.*, 335 NLRB 602 (2001) (internal citations omitted). In *Viacom Cablevision*, 267 NLRB 1141 (1983), the Board overruled objections to a decertification election where an employer compared the pay and benefits of employees in its nonunion locations with those at the unionized ones, explaining that employees who decertified the union had done better than those who remained non-union but that it could not make any promises.

Critically, Williams testified that she told the employee that however they voted, the Employer would respect their decision. 439:9-446:10. She pointed to the fact that the Employer, when it took over for the predecessor company that managed the same facility, recognized the Union and did not engage in cut backs. *Id.* She told them that the Employer is “all about the employee” and that if they want a union, they can have a union. 446:1-10.

Regarding (iv), the Union fails to meet its burden to prove specific evidence of prejudice caused by any alleged benefit. *See Sequel of New Mexico*, 361 NLRB 1124, 1125 (2014) (rejecting objection where union failed to prove size of benefit, including cost of food and drinks provided, or any deviation from past practice at similar events); *see also Peachtree City Warehouse, Inc.*, 158 NLRB 1031, 1035-1036, 1039-1040 (1966) (unobjectionable for employer to provide dinner with music, dancing, and liquor shortly before election); *Lach-Simkins Dental Laboratories*, 186 NLRB 671, 671-672 (1970) (unobjectionable for union to sponsor free luncheon at the time and near the place of polling).

Williams testified that in the all-staff meeting where she spoke prior to the election, Evans had provided some raffle door prizes consisting of movie tickets and \$5 gift cards. 474:1-3. The Union cannot misconstrue that as an impermissible promise of benefits. First, Williams testified without contradiction that such door prizes are always provided in staff meetings as part of the Employer's culture. *Id.* Further, the Board holds that such nominal items are "too minimal a benefit" to interfere with, restrain, or coerce the employees in the selection of their representative. *Joe's Plastics*, 287 NLRB 210 (1987); *see also Nu Skin Int'l, Inc.*, 307 NLRB 223 (1992) (dismissing objection to provision of gifts worth \$4 or \$5 because that constituted "nominal value" not likely to interfere with employee free choice); *see also Jacqueline Cochran, Inc.*, 177 NLRB 837 (1969) (distributing free turkeys not objectionable). The Union provided no evidence to demonstrate how many employees received prizes, nor that their receipt or eligibility for the raffle had anything to do with the election or was contingent thereon.

Regarding (v), Dietary Aide Gonzales testified that, at some unspecified time prior to the election, *he* "initiated" a "brief" conversation with the Nutritionist Elizabeth Olivares. 62:1-5. He testified that he is "very pro-union and so I'd always talk about the Union." 63:8-14. After asking the Nutritionist something to the effect of 'what did she think about the union' or 'why can't the Union and Employer work together', Olivares said something about the Employer being able to "do more fun activities" like gift card exchanges if there was no Union. 64:18-65:4. He responded to her that "well, if we got a raise we wouldn't need \$50 gift cards to Walmart because it would be nice to just have a raise." 65:1-4. Dietary Aide Gonzales described it as a "brief conversation." 65:8.

First, the Olivares is not a supervisor. The Union has the burden of proving such and fails. *See Millard Processing Services, Inc.*, 304 NLRB 770, 771 (1991). Gonzalez credibly testified

that the Nutritionist is merely a position designed to be a conduit between the Dietary Department and nursing. 299:15-21. The Nutritionist has no supervisory responsibilities in relation to the Dietary Department for hiring or firing; for disciplining or promoting; for soliciting grievances or fixing problems; for setting schedules; for providing rewards or bonuses; dictating any terms of their compensation; or providing any direct instructions (rather, she must interact directly with the Dietary Department manager). 299:10-301:5. Although Gonzales testified that he considered her a “boss,” he also testified initially that he did not consider her a “boss”: “We have one dietician—I don’t believe she has like the – like she’s not like our boss. She’s like in the – she helps out with some [food preparation] tickets but I don’t think she will be there like writing me up or anything.” 58:23-59:3 (emphasis added). He also testified that he had observed her, on occasion, help with food preparation for residents by making a sandwich. 61:16-19.

Second, even if Olivares is a supervisor, it is well settled that Section 8(c) of the Act gives employers the right to express their views about unions so long as they do not threaten reprisals or promise specific benefits. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *see also Fjc Sec. Servs., Inc.*, 360 NLRB 32, 35 (2013). In *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), the Board found that the employer did not violate the Act when it informed employees that the union was no good, had threatened to burn down the facility, and would charge substantial sums because such comments did not rise to the level of threats of reprisal or promise of benefits.

Third, even if Olivares made the comments as alleged, there is no evidence that Gonzales was impacted. Indeed, he immediately pushed back against her comments. Further, there is no evidence that any other employees heard Olivares’ comments or that Gonzales repeated them to anyone. The record indicated it was a private conversation. *See Bon Appetit Management Co.*, 344 NLRB No.130 (2001) (low-level supervisor asked employee how she was going to vote and

threatened to cut her pay if she voted for the union; misconduct was isolated and not disseminated, and election results were lopsided).

Regarding (vi), “[t]he Board's principles in this area are longstanding and have been equitably applied to employers and unions alike: [C]ampaign parties, absent special circumstances, are legitimate campaign devices.” *Sequel of New Mexico*, 361 NLRB 1124, 1124 (2014) (rejecting hearing officer’s sustaining of objection to holiday party announced the same day decertification petition was filed). “Thus, the Board will not set aside an election simply because the union or employer provided free food and drink to the employees.” *Id.* citing *Chicagoland Television News, Inc.*, 328 NLRB 367, 367 (1999).

Dietary Aide Gonzales testified that the Employer held, what he perceived to be, an “anti-union barbeque” the same month as the election where it served hamburgers and had a box of ‘vote no’ buttons available for employees.¹³ 68:12-19; 69:11. 71:1-75:5. Dietary Department Manager Gonzalez clarified, however, that the barbeque was to celebrate Memorial Day, which the facility had been doing for at least the past 6 years.¹⁴ 301:10-303:5. He testified that the Memorial Day barbeque had been advertised with flyers throughout the facility – Er. Exh. 2; 306:4-14. The flyer, half of it featuring an American Flag, stated “Join Us For a Memorial Day Barbeque.” *Id.* Gonzalez testified that there was a shipping box of buttons stating “Give Dycora a Chance” on an

¹³ Dietary Aide Gonzales testified that an unidentified person, one of the “secretaries for like the departments” put a “vote no” button on his shirt at the barbeque. 68:12-69:8. He testified that he told her did not want it and then made her listen to his speech on capitalism for about five minutes and then she didn’t “bug” him again. 68:3-69:11. Gonzalez clarified in his testimony that he was later “laughing about it” that that he was not “going to be upset about it.” 108:1-5. He also clarified that it was a “nice conversation” and “welcoming” and that “I didn’t feel too uncomfortable having it ... I took it as very playful.” 107:5-17. He concluded that “I don’t know, it was just campaigning I guess.” *Id.* Hernandez testified that “[n]obody approached me to give me any buttons” prior to the election. 205:12-14.

¹⁴ Dietary Aide Gonzales testified that the Employer regularly holds barbeques on holidays, nursing appreciation week, dietary week and sometimes just for random occasions. 72:10-15.

empty table, but that there was no person standing by it, encouraging employees to take them, or putting them on people. 303:22-304:7. He testified that the atmosphere was “lively” and “fun,” that people were socializing and sitting down at tables conversing. 305:2-5.

Regarding (vii), Cortes testified he was talking with three Dietary Department employees in the breakroom [no other employees present] on May 25 or 26, and that when one employee asked him why the Employer was paying them so little, Dietary Department Manager Gonzalez (also in the breakroom) interjected that “if you wouldn’t be union, I could get you more.” 238:2-242:14; 247:6-9. Cortes testified that he (the only person standing in the room) immediately “engaged” Gonzalez (in front of the employees) to ask “why is that that he was saying that?” to which Gonzales responded “oh, because with the contract [CBA] I cannot pay them more.” 243:1-6. Cortes responded (still in front of the employees, and standing) that “it was not true because the contract says that management is obligated to pay only what the minimum of the skills are. That they can pay more at their discretion.” *Id.* Cortes testified that after his retort, Gonzalez “stayed quiet.” 243:8. Cortes testified that he spoke with those same employees later that day, and two or three more times on later days. 279:16-280:4. The Union called none of those employees as witnesses and an adverse inference should be drawn thereupon.

First, Gonzalez credibly testified that he was confident that he never made the statements, or ones like them, to employees or Cortes. 310:1-311:19. He recalled speaking with Cortes two weeks prior to the election outside the breakroom, in the hallway, where Gonzalez told him not to talk to employees who were in the middle of job duties, to which Cortes (still in the hallway) told him “this is my right. Read your union agreement and file a grievance against me if you want. I’m going to do what I want.” 312:8-10; 337:1-338:6.

Unlike Gonzalez's, Cortes' testimony was not credible. At numerous points, Cortes provided highly unlikely, untruthful testimony that the Union Business Agent assigned to the facility had "no involvement" with the Union's efforts to encourage voting for the union in the election. 267:24-268:16. Cortes also testified in unbelievable fashion that (1) at no point did he have a meeting with Grant-Clarke at the facility while he was also assigned there as the external organizer, (2) that she never relayed any questions or concerns that employees had raised with her, and (3) that "there was no involvement of [Union Business Agent] Pauline [Grant-Clarke] to my knowledge to move employees to vote in support for the Union." 266:15-17; 268:2-6.

Second, Cortes' ability to immediately respond to Gonzalez' alleged statements undercuts any impermissibly impact it could have had on the three employees present. Indeed, Cortes testified that after he questioned Gonzalez about the basis for his statement and undercut its logic, Gonzalez was silent. Cortes also testified that he spoke with the same group of employees later in the day and at least two or three more times, in each instance capable of clarifying or disputing what Gonzalez said and any reasons to reject it.

Further, under an objective standard, the Union cannot prove that any of the employees could have reasonably understood that the Dietary Department Manager alone would have been able to get them raise increases if there was not a Union. Beyond that, the Union provided no evidence that Gonzalez's statement was ever disseminated or repeated beyond the three Dietary Department employees who allegedly overheard it. *See Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246 (2014) (union offered no evidence alleged threats were disseminated to any other employees, and the alleged threats affected "significantly fewer employees than the 18-vote margin"). The Board "will not infer dissemination, even there the threat is a significant one." *Fjc Sec. Servs., Inc.*, 360 NLRB 32, 35

2. Failure of Objection 5 (Solicited grievances and made implied promise to remedy them)

An employer is prohibited from expressly or implicitly soliciting employee grievances and promising to correct them to influence employees to vote against union representation. *MacDonald Machinery Company, Inc.*, 335 NLRB no. 27 (2001). However, generalized expressions of an employer's desire to make things better are permissible statements and within the limits of permissible campaign messaging. *Id.*; *see also National Micronetics*, 277 NLRB No. 95 (1985) (request for employees to give the company "more time" or "a second chance" too vague to rise to level of illegal promise of benefits). Further, that an employer is responding to concerns brought by employees, and has done so in the past, overcomes any "compelling inference" that asking employees what could be done to improve conditions or remedy issues is intended to influence employees to vote against a union. *Machinery*, 335 NLRB no. 27; *see also Efco Corp.*, 327 NLRB 372, 378 (1998) (no misconduct where employees approached management to discuss problems and employer had open door policy.)

The union's proffered evidence for this objection appears to be the testimony from Hernandez that (i) Williams held a meeting with employees to respond to their concerns, and (2) that after Hernandez asked about whether employees would be receiving retro pay, she was told by Smith the following day that they would. That allegation fails for the same reasons stated in the sections above including i(c) and ii.

3. Failure of Objection 6 (Questioned and polled employees regarding support for the Union)

"The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation." *Advanced Masonry Assocs.*, 366 NLRB No. 57 (2018) citing *Rossmore House*, 269 NLRB 1176 (1984). For example, the Board evaluates "whether there was a history of employer hostility or discrimination; the nature

of the information sought (whether the interrogator sought information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply.” *Id.* (dismissing interrogation allegation because there was no evidence of a history of hostility to the union, there was no evidence that the information was sought to take action against the employee, the conversation occurred in a parking lot, and the employee was not intimidated by the inquiry and walked away without responding).

The Union failed to proffer any evidence in support of this objection. The lack of any testimony as to unlawful questioning or polling is consistent with the uncontested testimony from Dietary Aide Dolores Vasquez, who testified that at no time prior to the election did any supervisor inquire as to how she or others planned to vote in the election. 372:2-9. Dietary Aide Gonzales also testified that no member of management ever demanded to know how he planned to vote. 111:19-22. The Union initially identified Hernandez as its support for this objection, but she provided no testimony regarding question or polling of herself or others. At most, Hernandez testified that in the week prior to the election she attended an all-staff meeting, as described above, where Williams responded to employee questions, but that does not constitute impermissible interrogation or polling.

4. Failure of Objection 8 (Changed terms and conditions of employment of eligible voters)

A unilateral change constitutes objectionable conduct, and may result in setting aside an election *only* where it has the tendency to interfere with employee free choice. *See Lake Mary Health Care Assoc.*, 345 NLRB No. 37 (2005) (objectionable misconduct for employer to announce the elimination of an extra shift bonus 24-hours before an election). Here, it is “virtually impossible” to conclude that the alleged 8(a)(5) and (1) violations would have impacted the

election results where they only related to a relatively small portion of the unit (the Dietary Department), and the changes were rescinded in one day (re the schedule change) and within two months (re the food policy), both months before the election on May 31. Initially, the Complaint itself fails for the reasons specified above, especially because the alleged changes were announced and implemented per a Management Rights provision in the then-effective CBA.

Further, there is no question that both alleged changes were made for legitimate reasons unconnected to the election. *Caron International, Inc.*, 246 NLRB 1120, 1121 (1979); *see also Columbus Transit*, 357 NLRB 1717 (2011) (refusal to bargain 1 week before election not likely to deprive intervening union “of a possible campaign platform” and noting petitioning union’s substantial win margin).

The Complaint’s allegations also fail to constitute a sufficient objection because the complaint hinges substantially on Employer in-services held on December 28, 2017, *which is twenty days before the Petition was filed on January 17*. It is well-established, and self-evident, that an alleged unilateral change cannot support a finding of objectionable conduct where it occurred prior to the filing of the petition. *See Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961).

Further, even if, *arguendo*, a technical 8(a)(1) or (5) violation is found, there is no showing that those alleged changes interfered with the election. That is the core question in these proceedings. See GC Exh. 1(v)(“[t]he objections and allegations of the Complaint shall be considered *to the extent that they bear on the validity of the election.*”) (emphasis added); *see, e.g., Zartic, Inc.*, 277 NLRB 1478 (1986) (addition of picnic tables and installation of air conditioners not the type of changes done to influence outcome of election.)

Here, it is undisputed that both alleged “changes” were quickly rescinded. The schedule change was halted the day it was to go into effect – January 9. The alleged adjustment to food consumption policy was rescinded by February. The election here was held in May 31, and during that time the Union had two representatives very frequently present at the Employer’s facility. If anything, the Union was able to take credit with the workforce for the rescissions to the alleged policy changes. Indeed, Dietary Aide Gonzales testified that the Union steward informed the Union about the alleged changes to schedule and food policy, that Grant-Clarke said it was “not acceptable and would do something about it, “[a]nd then shortly afterwards, we didn’t have to do that anymore.” 87:2-5.

5. Failure of Objection 9 (Discriminatorily applied unlawful solicitation by allowing petitioner’s supporters and/or managers to engage in solicitation on working time and in patient areas, allowing them to wear anti-union buttons/stickers, while maintaining a non-solicitation policy prohibiting eligible voters from wearing pro-union stickers)

The Union’s objection fails because there is zero evidence that the Employer prohibited a single employee from soliciting coworkers or wearing pro-union stickers. Indeed, Union counsel walked this baseless objection back hearing, stating is “no allegation that any employee was prohibited from wearing pro union buttons or not.”¹⁵ 272:10-2. Oviedo testified without contradiction that no employee has ever been disciplined for violation of Dycora Fresno’s Solicitation or Computer policies. Further, there was uncontested testimony that the Union’s supporters left flyers on tables and did, in fact, wear upon buttons at the facility prior to the election. Cortes testified that he observed 60 or 80 employees at the facility wearing Union

¹⁵ Union counsel agreed with Judge Sotolongo’s characterization of the evidence and position of the Union that “numerous employees on both sides – numerous employees, during the course of the campaign wore pro union insignia buttons, and numerous employees also wore anti-union insignia and buttons, and that neither of those two groups of employees was interfered with or told they couldn’t do so during the course of the campaign.” 274:23-275:7.

branded badge holders. 268:22-269:9. He was not aware of any employee ever disciplined for wearing them. 269:17-19. Cortes also testified that employees wore pro-Union buttons that he distributed the day before the election. 270:22-25.

6. Failure of Objection 10 (Unlawfully aided and assisted the petitioner and supporters by allowing them to use the Employer's bulletin board to solicit and distribute literature but prohibiting the Union from doing the same)

The Union's proffered evidence for this objection appears to be that (i) the Union was only provided one bulletin board in the employee break room where it posted materials, and that the Employer had two; (ii) that in one instance an employee in the bargaining unit posted a pro-Employer flyer on the refrigerator in the employee breakroom. 232:1-19. There is no case holding that an Employer must provide an equal number of bulletin boards. There was also evidence here that the Union never requested (and was denied) or needed any more space. By all accounts, the Union was provided, and posted material, on a bulletin board in the employee breakroom and Union flyers were left on a table there. 372:10-19. Dietary Aide Gonzales testified that the Union "always put up flyers in the break room" to encourage employees to vote for the Union. 112:2-6.

7. Failure of Objection 11 (Maintained unlawfully overbroad rules which interfered with employee free choice and destroyed laboratory conditions for fair election)

The Union's proffered evidence for this objection is that the Employer's handbook contains two allegedly, "unlawfully overbroad" provisions in its employee handbook: (i) Solicitation And/Or Distribution Of Literature ("Solicitation Policy"); (ii) and Computer Use, Email, Voice Mail And The Internet ("Computer Policy").

As an initial matter, the Union did not dispute Oviedo's testimony that no employee has ever been disciplined for violation of either policy. 362:18-363:5. The Union provided no evidence that the Union has ever filed a grievance or unfair labor practice charge against either policy. Further, there was testimony at Hearing that the Union's assigned representatives and

other supporters at the facility prior to the election did engage in solicitation activities, including posting and distributing flyers and wearing buttons, indicating that the Employer was not actually “maintaining” whatever interpretation of the Solicitation policy the Union alleges.

The Solicitation Policy states:

Approaching residents, staff, and others, asking them to join an organization, buy a product, read written material or support a cause can create uneasiness and undue pressure. Such activities also interfere with resident care. “Solicitation” is the act of urging, cajoling or persuading someone to accept a product or service for sale, a doctrine to follow, or an organization to join. “Distribution of literature” is the handling or passing out (or any other means of transmittal) of any written material (such as advertising, flyers, handbills or enrollment material) to an individual that would aid in soliciting the individual. Solicitation and/or distribution of literature by one employee to another employee is prohibited while either person is on working time or in immediate patient care areas. “Working time” is all time when your duties require that you be engaged in work tasks but does not include your own time, such as meal periods, scheduled break times, times before or after a shift, and personal cleanup times. Solicitation, distribution of literature and trespassing by non-employees is prohibited on company premises. Employees should not leave unattended non-work related material in any area of the office or break rooms.

ER Exh. 3, p. 33.¹⁶

The Computer Policy states:

The computer and telephone systems are important assets and have been installed to facilitate business communication. Although you may be able to use codes to restrict access to information left on the systems, it must be remembered that these systems are intended solely for business use. They are not private or confidential. In keeping with this intention, we maintain the ability to access and monitor any information on the systems. Because we reserve the right to obtain access to all voice mail and computer files, including e-mail, you should not assume that such messages are confidential

¹⁶ The Union’s attempt to introduce a prior version of the handbook should be rejected given no proper foundation or authentication was provided, let alone testimony that it was implemented or distributed at Dycora Fresno, but in any event, there is no difference in the language of the two policies which the Union alleges are unlawfully overbroad. *Compare* ER. Exh 3, pp. 33 and 39 with Union Exh. 2(b), pp. 31 and 37.

or that access by this center or its designated representatives will not occur. Access to these systems may be conducted before, during or after working hours, and in the presence or absence of you. You are asked to always receive prior authorization before changing any access codes that are available to you. In addition, you are prohibited from unauthorized use of access codes of other employees to gain access to voice mail or computer network systems. Some positions may be authorized to have internet access for business reasons. Internet use must be reserved for business purposes only.

ER. Exh. 3, p. 39.

Neither the Computer nor Solicitation policy can be reasonably interpreted as prohibiting section 7 activity. Indeed, for the critical context of the policies, the Social Media policy (which the Union has not objected to), states that “nothing in this, or any other policy, is intended to restrict activity protected by federal or state law, including the National Labor Relations Act’s protections concerning Section 7 right and concerted activity” ER Exh. 4, p. 4. The solicitation policy does not prohibit off-duty employees from soliciting nor does it prohibit solicitation in non-patient care areas. *See UPMC*, 366 NLRB No. 142 (2018).

The Board has recently clarified the law regarding handbook provisions. *See Boeing Company*, 365 NLRB No. 154 (2017). Now, policies are lawful to maintain where they, when reasonably interpreted, do not prohibit or interfere with the exercise of NLRA rights or the potential adverse impact on protected rights is outweighed. *Id.* For example, in *Boeing*, the trial judge found unlawful an employers’ prohibition against any use of cameras for images or videos absent “valid business need.”. The Board overturned, and rejected, the trial judge’s finding and the dissent’s arguments, based on *Lutheran Heritage*, 343 NLRB 646 (2004), that employees would reasonably construe the employer’s rule to prohibit section 7 activity like recording images of picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or

documenting inconsistent application of employer rules. Instead, the Board held that the policy was facially lawful and justified, just as the Employer's policies are here.

Regarding the Computer Policy, the Union may attempt to rely on the Board's decision in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), which recognizes employee Section 7 rights to presumptive use "email for statutorily protected communications on nonworking time." However, that decision "applies only to employees who have already been granted access to the employer's email system," and there is no record evidence whatsoever that any of the employees in the Unit have been granted access to the employer's email system or otherwise use it. Further, here, the Computer policy does not restrict email use, only internet.

Further, *Purple Communications* relied principally on the Board's decision in *Lutheran Heritage*, which was overturned in *Boeing Company*. See 361 NLRB at 1111. Thus, *Purple Communications*' continuing validity has been undermined and it cannot and should not be relied upon. Indeed, on August 1 the Board invited amicus briefing in *Caesar's Entertainment Corp.*, 28-CA-060841, regarding whether it should modify or overrule *Purple Communication* to return to the standard in *Register Guard*, 351 NLRB 1110 (2007), where the Board held that employees do not have a presumptive right to use employers' email system for section 7 activity. See *Rio All-Suites Hotel and Casino*, 28-CA-060841, unpub. Board order issued Aug. 1, 2018 (2018 WL3703476). Further, as of September 24, the Board has moved for, and been granted a stay in proceeding in the Ninth Circuit in *Purple Communications, Inc., v. NLRB*, case no. 17-70948 et al., CM/ECF 75 and 79, while the Board considers the above-stated amicus briefs it has invited.

Even assuming, *arguendo*, that the Solicitation and Computer policies were unlawful, they do not justify setting aside the election. The Board holds that "[T]he mere maintenance of an

arguably overbroad rule will not be the basis for overturning an election where an incumbent union was in a position to advise employees of their rights.” *Delta Brands, Inc.*, 344 NLRB 252 (2005). For example, in *Safeway, Inc.*, 338 NLRB 525 (2002), the Board held that an arguably overbroad confidentiality rule could not have reasonably affected the outcome of a union-decertification election. Here, the Union’s two assigned representatives testified that they were frequently at the Employer’s facility leading up to the election so that they could meet with members and answer questions. Their ability to advise employees of their rights and answer any questions is undisputed. This is not a situation, like in *Jurys Boston Hotel*, 356 NLRB 927, 930 (2011), where there was evidence that unlawful rules were actually applied to or chilled employees and where a single vote decided the election.

IV. CONCLUSION AND REQUESTED RELIEF

On May 31, the Unit employees voted 74 to 42 against continued representation by the Union. The Union fails to meet its heavy burden to prove sufficient objectionable misconduct to justify setting aside the election, particularly given a 32-vote loss margin (28% of all votes) and the fact that the Union deployed two union agents at the facility to drum up support.

Regarding the Complaint, even if *arguendo* the 8(a)(1) and (5) allegations did not fail due to Management Rights provision in effect the time the alleged changes were announced and implemented, the GC and Union fail to meet *their burden* to prove a material, substantial, and significant unilateral change in violation of section 8(a)(5) of the Act. In any case, both the alleged changes were undisputedly rescinded by February 2018 (*i.e.*, 3 months before election), and there is no nexus between the alleged changes, employee free choice, and the lopsided election results. The Union’s objections and the Complaint should be dismissed. The Regional Director should proceed to certify the results of the election.

Dated: October 4, 2018

Respectfully submitted:

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DYCORA TRANSITIONAL HEALTH –
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CERTIFICATE OF SERVICE

I, Henry Leung, hereby certify that on October 4, 2018 before 11:59 PM pacific time, I filed DYCOR TRANSITIONAL HEALTH – FRESNO’s LLC’s POST-HEARING BRIEF on the NLRB’s e-filing system at www.nlr.gov and served a copy of the foregoing via email upon the following:

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